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IN THE

Supreme Court of the United States

ANTHONY DISMUKE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Wisconsin State Statute contains a two-pronged offense for vehicular fleeing. To fall under the first prong, an offender needs to endanger the operation of a police vehicle, traffic officer, or pedestrians. The second prong does not depend on whether anyone or thing be endangered, rather it applies when the offender increases his speed or extinguishes the vehicle's lights to flee.

Does a conviction for attempting to flee or elude a police officer in a motor vehicle under only the second prong of such a fleeing statute constitute a "violent felony" under the residual clause of section 924(e)(2)(B)(ii) of the Armed Career Criminal Act?

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The opinion of the Court of Appeals in Petitioner's petition for review is published and reported at 593 F.3d 582 (7th Cir. 2010), and reprinted at Pet. App. 1a-28a. The District Court's sentencing opinion and pre-trial decision are reprinted at Pet. App. 29a-38a and Pet. App. 39a-50a, respectively. The Court of Appeals' denial of Petitioner's petition for rehearing and rehearing *en banc* is reprinted at Pet. App. 51a-52a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 2010, and Petitioner's petition for rehearing and rehearing *en banc* was denied on April 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case revolves around the interpretation of 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act ("ACCA"), which provides:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another* . . . .

(Emphasis added). The italicized phrase is the key provision at issue here.

INTRODUCTION

On January 29, 2007, on a tip from an anonymous informant, the Milwaukee police barged into the residence at 2528 W. Locust Street, breaking out the windows, and throwing stun grenades. They expected and were prepared to find an arms dealer. Instead, the police officers found 51-year-old Anthony Dismuke babysitting his 12 year-old granddaughter. After handcuffing both Mr. Dismuke and his granddaughter, the officers did not find a basement or any room full of weapons. Their search netted two guns. Although Mr. Dismuke was not the arms dealer the police were prepared for, applying the Armed Career Criminal Act ("ACCA"), the district court was able to sentence him like one. Mr. Dismuke was sentenced to 15 years of imprisonment, Pet. App. at 38a, even though the district court found that the "record contained no evidence" that he "ever used" or "carried" the guns at issue. *Id.* at 36a.

Under section 924(e)(1) of the ACCA, a felon convicted for possession of a firearm who has three previous "violent felony" convictions, is subject to a mandatory minimum sentence of 15 years imprisonment. The court concluded that Mr. Dismuke had three such convictions. Pet. App. 33a-34a. The third conviction relied on by the district court is the subject of this appeal. In 1998, Mr. Dismuke was convicted of vehicular fleeing under Wisconsin state law. *Id.* at 31a. The analysis of whether Mr. Dismuke's 12 year-old fleeing conviction is a qualifying violent felony turns on the interpretation of the ACCA's residual clause. 18 U.S.C. § 924(e)(2)(B)(ii). This Court held in *Begay v. United States*, 553 U.S. 137, 144-45 (2008), that an offense falls under the residual clause if it is similar in risk and kind to the ACCA's enumerated crimes.

The Seventh Circuit held that Mr. Dismuke was charged with the type of fleeing set forth in the second part of the Wisconsin statute. Pet. App. 16a. That part excludes conduct that endangers anyone or anything. In fact, a person need only to flee by increasing speed or extinguishing the vehicle's lights to violate the second part. Wis. Stat. § 346.04(3) (1998). Nonetheless, the Seventh Circuit found that the second part of Wisconsin's fleeing statute fell within the ACCA's residual clause and was thus a violent felony. Pet. App. at 28a.

That decision reinforced an entrenched and irreconcilable split among six circuits on whether nonviolent vehicular fleeing satisfies *Begay's* two-part test. The Eighth and Eleventh Circuits have

found that nonviolent fleeing offenses criminalize conduct that neither presents a serious potential risk of injury, nor is violent or aggressive. Also, in an unpublished decision, the Ninth Circuit reached the same outcome. The Fifth, Sixth, Seventh, and Tenth Circuits have found that such nonviolent fleeing puts officers, pedestrians, and other motorists in serious potential risk of injury, and is purposeful, aggressive, and violent conduct. *See, e.g.*, Pet. App. at 26a-27a. In a similar case before the Seventh Circuit, however, Judge Richard Posner called for this Court to find that such fleeing is not a violent felony. *Welch v. United States*, 604 F.3d 408, 433-35 (7th Cir. 2010) (Posner, J., dissenting). Indeed, only this Court can settle the issue and end the conflict between the circuits.

In addition, those circuits that are holding that nonviolent vehicular fleeing satisfies *Begay's* test, like the Seventh Circuit did here, are misapplying this Court's ACCA precedent. This Court's intervention is needed to correct this misapplication of the law.

STATEMENT OF THE CASE

Statement of Facts

On January 29, 2007, Anthony Dismuke was 51 years old, and visiting his 12-year-old granddaughter, Aniyiah. (Trial Tr. Vol. 1, 31, Nov. 5, 2007.) Mr. Dismuke offered to baby sit and help Aniyiah with her homework, because she was having trouble in school. (*Id.* at 139.) After fixing Aniyiah a snack, Mr. Dismuke left her briefly in the living

room while he went to the basement. (*Id.* at 139-40.) When her grandfather was in the basement, Aniyiah noticed people lining up on the porch and "busting out all the windows." (*Id.* at 140.) Aniyiah yelled for her "Papa," as the people outside shot something in the window, which sounded like a gunshot. (*Id.* at 141.) A swarm of officers from the Milwaukee Police Department then stormed the house, guns drawn, and handcuffed both Mr. Dismuke and his adolescent granddaughter. (*Id.* at 141-42.)

Executing a search warrant based on a confidential informant, the officers found two guns in a bedroom at 2528 West Locust Street in Milwaukee. Pet. App. at 36a, 40a-41a. Mr. Dismuke challenged the constitutionality of the search warrant,[1] *id.* at 39a, and disputed that he lived at the residence or possessed the guns in question. *Id.* at 36a. Nevertheless, Mr. Dismuke was indicted, and eventually convicted of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). *Id.* at 29a. The district court, however, found that Mr. Dismuke's offense "was not in any way aggravated," because "the record contained no evidence that [he] ever used the guns, threatened anyone with them, or carried them on his person." *Id.* at 36a.

The pre-sentence report ("PSR") concluded that Mr. Dismuke qualified as an armed career criminal

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[1] The district court denied Mr. Dismuke's motion to suppress, and the Seventh Circuit later affirmed this ruling. Pet. App. at 5a-11a. Mr. Dismuke continues to object to the propriety of the search and argues that evidence found during the search should be suppressed.

under 18 U.S.C. § 924(e)(1), which carries a 15-year mandatory minimum sentence of imprisonment. Pet. App. at 30a. One of the convictions that the PSR cited as the basis for Mr. Dismuke's armed career criminal enhancement was his 12-year old 1998 conviction for attempting to elude a police officer in violation of Wisconsin statute section 364.04(3). Pet. App. at 30a-31a. The district court then determined that his conviction qualified as a violent felony under the ACCA. *Id.* at 31a-33a. On appeal, the Seventh Circuit affirmed, finding that the second part of the Wisconsin vehicular fleeing statute satisfied the requirements for a violent felony articulated by this Court in *Begay*. *Id.* at 15a-27a. But the Seventh Circuit acknowledged that circuits are split on the issue of whether certain vehicular fleeing constitutes a violent felony. *Id.* at 28a. On April 19, 2010, the Seventh Circuit denied Mr. Dismuke's petition for rehearing and rehearing *en banc*. *Id.* at 52a.

ACCA Statutory Background

Section 924(e)(1) of the ACCA provides a mandatory minimum sentence of 15 years of imprisonment for "a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1).[2] Section

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[2] Section 922(g), in relevant part, makes it "unlawful for any person . . . who has been convicted in any court of, a crime punishable for a term exceeding one year" to possess "any firearm or ammunition." 18 U.S.C. § 922(g)(1).

924(e)(2)(B) defines a "violent felony" as follows:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Since the ACCA was enacted, this Court has interpreted the contours of the "violent felony" definition multiple times, especially as to which crimes fall into what has become a particularly problematic clause, the ACCA's residual clause—"otherwise involves conduct that presents a serious potential risk of physical injury to another."

In *Taylor v. United States*, 495 U.S. 575, 600 (1990), this Court held that the analysis of whether a prior conviction constituted a violent felony was limited to a formal "categorical approach": "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those

convictions." This Court also recognized in certain cases, where the statute at issue includes a broad range of conduct, that the sentencing court can apply a "modified" categorical approach and look to "the indictment or information and jury instruction" to determine which part of the statute the defendant violated. *Id.* at 602. In *James v. United States*, 550 U.S. 192, 208 (2007), this Court further clarified that under the categorical approach "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk on injury to another." The sentencing court does not need to determine if "every conceivable factual offense covered by a statute must necessarily present" such a risk. *Id.*

In *Begay v. United States*, 553 U.S. 137 (2008), this Court held that for an offense to fall under the ACCA's residual clause it must (1) "present[] a serious potential risk of physical injury to another" similar to the enumerated crimes, *id.* at 142, and (2) be similar in kind to those crimes, in that it must "involve purposeful, violent, and aggressive conduct." *Id.* at 144-45 (citation and internal marks omitted). This Court also noted that *Begay's* two-part test required "a crime-by-crime analysis." *Id.* at 143. Applying that two-part test, this Court assumed that a DUI presents a serious potential risk of injury, *id.* at 141, but still held that the offense was not a violent felony because it was a crime of "negligence or recklessness" not "associated with a likelihood of future violent, aggressive, and purposeful 'armed criminal' behavior." *Id.* at 146-48.

In *Chambers v. United States*, 129 S. Ct. 687, 691-92 (2009), this Court held that failure to report to periodic imprisonment did not present a serious potential risk of physical injury. In addition, this Court held that a failure to report did not fulfill *Begay's* similar-in-kind requirement, noting that it was a "far cry from the purposeful, violent, and aggressive conduct potentially at issue when an offender" commits one of the ACCA's enumerated crimes. *Id.* at 692 (citing *Begay*, 553 U.S. at 144-45) (internal marks omitted).

The Wisconsin Vehicular Fleeing Statute

The Wisconsin vehicular fleeing statute at issue here is entitled "Obedience to traffic officers, signs and signals; fleeing from an officer," and reads as follows:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

Wis. Stat. § 346.04(3). In this case, the Seventh Circuit concluded that the Wisconsin statute contains two distinct parts: (1) eluding "so as to interfere with or endanger the operation of the police

vehicle," "traffic officer" or "pedestrians"; and (2) "increas[ing] the speed of the operator's vehicle or extinguish[ing] the lights" to elude. Pet. App. at 15a-16a (quoting Wis. Stat § 346.04(3)) (alterations in original). The Seventh Circuit applied the modified categorical approach, considering each prong of the Wisconsin statute separately. *Id.* Based on Mr. Dismuke's charging documents, the Seventh Circuit placed him in the second part of the statute, *id.* at 16a,—"the operator [shall not] increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee" Wis. Stat. § 346.04(3). Notably, the court did not place him in the part that revolves around endangerment of a police officer, other motorists, or pedestrians.

REASONS FOR GRANTING THE PETITION

This Court should exercise certiorari review over this case for at least two reasons. First, and most significantly, six regional circuits have weighed in on the issue at hand and have reached disparate, irreconcilable, and non-uniform results. Second, the Seventh Circuit, and other circuits, have decided this important federal question in a manner that conflicts with this Court's guiding ACCA precedent.

I. A Significant And Entrenched Split Among The Six Circuits That Have Weighed In On The Issue Is Creating Disparate Results.

Currently, six circuits have directly decided the issue of whether a vehicular fleeing statute, which does not depend on whether an offender endangers

anyone or flees at a high rate of speed, meets *Begay's* two-part test. Two of those circuits have concluded that such offenses do not meet the test, and four circuits have reached the opposite conclusion. What is more, those same circuits are split on both parts of *Begay's* test. The two circuits have held that such nonviolent fleeing does not meet either part of the test. The other four circuits have found that it satisfies both parts. The *Begay* test requires that a "crime must (1) present a serious potential risk of physical injury similar in degree to the enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives; and (2) involve the same or similar kind of 'purposeful, violent, and aggressive' conduct as the enumerated crimes." Pet. App. at 16a-17a.

A. Two Circuits Hold That Nonviolent Vehicular Fleeing Does Not Satisfy *Begay's* Test.

The two circuits that have carefully considered the elements of the nonviolent vehicular fleeing statutes before them, like the one at issue here, have concluded that such statutes do not qualify as a violent felony (or a "crime of violence").[3] Specifically,

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[3] Courts must classify a defendant's prior offenses as a "crime of violence" to designate them a "career offender" under the Federal Sentencing Guidelines. *U.S. Sentencing Guidelines Manual* § 4B1.1. The definition of a "crime of violence" under *Guidelines Manual* section 4B1.2(a) is almost exactly the same as the ACCA's definition of "violent felony," including the same residual clause. Federal district courts apply ACCA precedent to determine "crime of violence" questions, and vice versa. *See, e.g., United States v. Wise*, 597 F.3d 1141, 1145 (10th Cir. 2010)

the Eighth and Eleventh Circuits have held that these fleeing statutes do not meet either part of *Begay's* test, concluding that the offenses do not present a serious risk of physical injury, nor are they violent and aggressive.[4] *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009); *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009).

In *Tyler*, the Eighth Circuit noted that under Minnesota's fleeing statute "[n]either high speed nor reckless driving" were elements: rather it "requires only that a perpetrator 'increase speed, extinguish motor vehicle headlights or taillights, [or] refuse to stop . . . with intent to attempt to elude a peace officer.'"[5] 580 F.3d at 725 (quoting Minn. Stat.

(looking to "cases construing the ACCA's parallel [residual clause] provision" for guidance interpreting "crime of violence").

[4] Although, as the Seventh Circuit has explained, the circuits are not split on the issue of whether vehicular fleeing constitutes "purposeful" conduct, Pet. App. at 21a, Mr. Dismuke advances the argument raised by Judge Posner in his dissent in *Welch*. In that case, Judge Posner argued that the ACCA's "purposeful" requirement should be limited to crimes where the offender must attempt to "harm a person's person or property, which is characteristic of the enumerated crimes." 604 F.3d at 434 (Posner, J., dissenting). As Judge Posner aptly noted, "[a]dopting a rule that would exclude from the category of 'violent felony' a crime that while it may be dangerous does not involve any intention of harming anyone would go some distance toward clarifying the meaning of 'violent felony' and by doing so check the avalanche of litigation over that meaning." *Id.*

[5] The Minnesota fleeing statute in relevant parts reads as follows:

§ 609.487(1)) (alteration and ellipsis in original). Indeed, the Eighth Circuit highlighted that a separate subdivision of the statute criminalizes flight that causes "bodily injury to any person other than the perpetrator." *Id.* (quoting Minn. Stat. § 609.487(4)). Consequently, the Eighth Circuit held that Minnesota's statute did not "typically involve conduct that presents a serious potential risk of physical injury to another." *Id.* (citation and marks omitted); *see also United States v. Furqueron*, 605 F.3d 612, 613 (8th Cir. 2010) (finding the same under the ACCA). Sticking to the statute's stated elements, the Eighth Circuit held that it also did not meet the second part of *Begay's* test, finding that "the elements of the statute do not require a confrontation, chase, or any other conduct indicating that the crime in question . . . is violent and

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> **Subd. 3. Fleeing officer; motor vehicle.** Whoever by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, is guilty of a felony and may be sentenced to imprisonment for not more than three years and one day or to payment of a fine of not more than $5,000, or both.
>
> **Subdivision 1. Flee; definition.** For purposes of this section, the term "flee" means to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle.

Tyler, 580 F.3d at 724 (quoting Minn. Stat. § 609.487(1), (3)).

aggressive." *Tyler*, 580 F.3d at 725. Much like the crime at issue here.

In *Harrison*, the Eleventh Circuit reached the same conclusion in its analysis of the second subsection of Florida's fleeing statute.[6] 558 F.3d at 1293-96. The Eleventh Circuit explained that "the behavior underlying Florida's willful-fleeing crime, in the ordinary case, involves only a driver who willfully refuses to stop and continues driving on—but without high speed or recklessness—makes it unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer." *Id.* at 1294. As such, the Eleventh Circuit found that such "disobedience" did not satisfy the first part of *Begay's* test. *Id.* For similar reasons, the Eleventh Circuit held that the statute did not satisfy the test's second part as well, concluding that "disobeying a police officer's signal and continuing to drive on, without high speed or reckless conduct, is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes." *Id.* at 1295.[7]

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[6] The Florida fleeing statute in relevant part reads: "*Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree . . . .*" *Harrison*, 558 F.3d at 1290 n.16 (quoting Fla. Stat. § 316.1935(2) (1999)) (emphasis and ellipsis in original).

[7] The Eighth and the Eleventh Circuits have demonstrated a case-by-case approach to the application of *Begay*. Consistent with that approach both circuits have reached the opposite

B. Four Circuits Have Found That Nonviolent Vehicular Fleeing Satisfies *Begay's* Test.

Not all Circuits have analyzed the elements of vehicular fleeing statutes as carefully as the Eighth and Eleventh Circuits. As a result, the Fifth, Sixth, Seventh, and Tenth Circuits have all split with the Eighth and Eleventh Circuits and held that violations of nonviolent vehicular fleeing statutes satisfy both parts of *Begay's* test. Pet. App. at 11a-28a; *United States v. Young*, 580 F.3d 373 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1723 (2010); *United States v. Harrimon*, 568 F.3d 531 (5th Cir. 2009), *cert denied*, 130 S. Ct. 1015 (2009); United *States v. West*, 550 F.3d 952 (10th Cir. 2008).

In this case, the Seventh Circuit applied the modified categorical approach and limited its review to the second part of Wisconsin's vehicular fleeing statute, Pet. App. at 15a-16a, which *excludes* "willful or wanton" fleeing that "interfere[s] with or

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conclusion when considering the violent subsections of fleeing statutes similar to the first part of the Wisconsin statute (*not* at issue here). *See United States v. Hudson*, 577 F.3d 883, 884-86 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1310 (2010) (finding Missouri's class D vehicular fleeing felony was a crime of violence, which entails "fleeing 'in such a manner that . . . creates a substantial serious risk of serious physical injury or death to any person.'" (quoting Mo. Rev. Stat. § 575.150.5)); *United States v. Harris*, 586 F.3d 1283, 1287-88 (11th Cir. 2009), *petition for cert. filed*, (U.S. May 14, 2010) (No. 09-10868) (finding third subsection of Florida's fleeing statute, which includes driving at "*high speed* or a *wanton disregard for the safety*," was a crime of violence (emphasis in original)).

endanger[s] the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians." Wis. Stat. § 364.04(3). Nonetheless, the Seventh Circuit still found that the nonviolent part of Wisconsin's statute met both the first and second parts of *Begay's* test.

Paying no attention to the elements of the second part of the statute, the Seventh Circuit explained that in the "ordinary case, '[t]aking flight [in a vehicle] calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit.'" Pet. App. at 26a (quoting *United States v. Spells*, 537 F.3d 743, 752 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009)) (alteration in original). As such, the Seventh Circuit held that the second part of the statute was violent and aggressive. *Id.* at 28a. The Seventh Circuit supported its holding with dicta from *Chambers*, in which this Court stated that the "behavior underlying an escape from custody" was likely "more aggressive" and "less passive" than for a failure to report. Pet. App. at 25a (quoting *Chambers*, 129 S. Ct. at 691). The Seventh Circuit concluded that nonviolent vehicular fleeing was more similar to an escape from custody than a failure to report. *Id.* at 26a-27a (citing *Harrimon*, 568 F.3d at 535; *United States v. LaCasse*, 567 F.3d 763, 767 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1311 (2010); *see also United States v. Wise*, 597 F.3d at 1146 ("Either prong of the [Utah] statute requires deliberate action—a far cry from a mere failure to appear at prison.").

The vehicular fleeing statutes at issue in the cases from the Fifth,[8] Sixth,[9] and Tenth[10] Circuits are nearly identical to the one at issue here—none depend on whether the offender flee at a high rate of speed or endanger any person or any thing. Utah's fleeing statute, like Wisconsin's, separates "willful and wanton" fleeing conduct that "interfere[s] with

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[8] The Texas fleeing statute reads in relevant part, "A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him." Tex. Penal Code § 38.04(a) (2004).

[9] The Michigan fleeing-and-eluding statute reads in relevant part as follows:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop, and who willfully fails to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the officer, is guilty of a misdemeanor, and shall be punished by imprisonment for not less than 30 days nor more than 1 year . . . .

Mich. Comp. Laws § 257.602a(1) (1996). In *Young*, the defendant's second offense of the Michigan statute was at issue, which is punishable for up to four years of imprisonment. 580 F.3d at 376.

[10] Pertinent to this petition, the Tenth Circuit examined the second part of Utah's "failing to stop" statute, which reads in relevant part, "[a]n operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not: . . . attempt to flee or elude a peace officer by vehicle or other means." Utah Code § 41-6a-210(1)(a)(ii) (2001).

or endanger[s] the operation of any vehicle or person" from other "attempt[s] to flee or elude." Utah Code § 41-6a-210(1)(a)(i)-(ii) (2001). But similar to the Seventh Circuit, the Tenth Circuit still found that the nonviolent section met *Begay's* test. *See Wise*, 597 F.3d at 1146 ("[I]n *West* we determined that *both* subsections of the Utah failure-to-stop statute are crimes of violence."). The Tenth Circuit stated that a "'deliberate choice by the driver to disobey the police officer's signal . . . poses the threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders.'" *West*, 550 F.3d at 964-65 (citation omitted). The Tenth Circuit also found that the conduct underlying the second part of Utah's statute was violent and aggressive. *Wise*, 597 F.3d at 1146.

Similarly, the Fifth Circuit in *Harrimon* found that an "ordinary case" of fleeing under the Texas fleeing statute "poses a serious risk of injury to others." 568 F.3d at 536. In addition, the Fifth Circuit held that a violation of the statute was violent and aggressive, because it "typically involves violent force" which the "arresting officer or officers, [and] also pedestrians and other motorists are subject to." *Id.* at 535. In *Young*, the Sixth Circuit echoed the sentiments of the circuits above, and also did not stick to the elements of the nonviolent fleeing statute before it, finding that the Michigan statue meets both parts of the *Begay* test, because "offenders typically attempt to flee by any means necessary, including speeding, extinguishing lights

at nighttime, driving the wrong way, weaving, etc." 580 F.3d at 378.

The Fifth, Seventh, and Tenth Circuits have acknowledged that circuits have "reached the opposite conclusion." Pet. App. at 28a; *Harrimon*, 568 F.3d at 535; *Wise*, 597 F.3d at 1147. After addressing the conflicting precedent, the Fifth, Seventh, and Eleventh Circuits each reached the same conclusion—that they "have the better of the argument." *E.g.*, Pet. App. at 28a.

C. The Circuit Split On Fleeing Statutes Has Resulted And Will Continue To Result In A Lack of Uniformity In The Law.

Individuals who violate vehicular fleeing statutes may be and many times are in different states and circuits when they are later sentenced as felons in possession of a firearm. Because of this fact, and the split on the issue, circuits and district courts have reached non-uniform interpretations on the issue of whether nonviolent vehicular fleeing satisfies *Begay's* two-part test.

First, under the current state of the law, there is a very high risk that two circuits will reach different outcomes on whether the *same state's* vehicular fleeing statute is a violent felony (or crime of violence). Indeed, this has already happened. In *United States v. Kendrick*, 423 F.3d 803, 809 (8th Cir. 2005), the Eighth Circuit held that conduct underlying Oregon's vehicular fleeing statute constituted a "serious potential risk of injury" and

thus was a crime of violence. In *United States v. Peterson*, the Ninth Circuit held that the *same Oregon statute* was not a crime of violence because it "criminalizes conduct that does not 'present[] a serious risk of physical injury to another." No. 07-30465, 2009 WL 3437834, at *1 (9th Cir. Oct. 27, 2009) (unpublished decision) (citation omitted). Inconsistencies such as this are likely to recur. *See Tyler*, 580 F.3d at 726 (noting disagreement with Sixth Circuit's decision that Michigan fleeing statute section 750.479a was a violent felony).

Second, circuits will stretch either the elements of a state's fleeing statute or their own vehicular fleeing precedent to prevent the appearance of further split on this issue. This too is already happening. To prevent the appearance of a split with the Eleventh Circuit, the Seventh Circuit in this case claimed that the second part of the Wisconsin statute, which is violated by only increasing one's speed or shutting off the vehicle's lights, was analogous to the third subsection of Florida's fleeing statute, which is violated when one flees at a high rate of speed or in "wanton disregard for the safety of persons or property." Pet. App. at 28a n.7 (citation omitted). That analysis is wrong; the two statutes are not analogous. The Florida subsection's elements depend on whether people or property are put at risk, and the Wisconsin statute's elements do not.

Similarly, the Eighth and Eleventh Circuits, attempting to distinguish their cases from those in which circuits have found that nonviolent vehicular fleeing statutes satisfy *Begay*'s test, have contributed

to the confusion. In *Tyler*, the Eighth Circuit compared Minnesota's fleeing statute to fleeing statutes from Utah and Michigan, which the Tenth Circuit and Sixth Circuit, respectively, had found met *Begay's* test. 580 F.3d at 726. The Eighth Circuit distinguished the second, nonviolent part of Utah's fleeing statute because the latter did not define the terms "flee" or "elude." *Id.* Yet in the next sentence, the Eighth Circuit stated that "Michigan's fleeing offense is defined similarly to Minnesota's," even though the Michigan statute *also does not define the terms "flee" or "elude."*

In *Harris*, the Eleventh Circuit analogized the third subsection of the Florida fleeing statute to the nonviolent statutes before the Fifth, Sixth, Seventh, and Tenth Circuits, noting that they all encompass willful fleeing. 586 F.3d at 1289 n.2. The Eleventh Circuit then concluded that "[t]he reasoning is the same in each case: willfully fleeing endangers officers, pedestrians and motorists." *Id.* That conclusion, however, flies in the face of the Eleventh Circuit's holding in *Harrison* that the "willful-fleeing" under the second subsection of Florida's statute was *not* a violent felony. 558 F.3d at 1294-96.

For all of these reasons, Judge Posner is correct, arguing in his dissent in *Welch*, 604 F.3d at 433-35, that the Seventh Circuit precedent that nonviolent fleeing statutes satisfy *Begay's* test, including this case, is questionable. Accordingly, Judge Posner called for this Court to overrule it. *See id.* at 435.

The split and resulting confusion on this issue is well developed and likely to lead to more irreconcilable and non-uniform results going forward. This has led to courts inconsistently issuing 15 year mandatory minimum prison sentences, unless this Court resolves the confusion.

Indeed, there is no reason why individuals, like Mr. Dismuke, should have to face a mandatory minimum sentence of 15 years of imprisonment, because they were sentenced in a circuit that has held that nonviolent vehicular fleeing statutes satisfy *Begay's* test and are violent felonies. While at the same time, his counterparts who violated a similar nonviolent fleeing statute, but are sentenced in circuits that have come out the other way, will not receive the ACCA's mandatory minimum sentence. That unfortunate geographic fact will result in individuals like Mr. Dismuke receiving at least five, and likely more, extra years of imprisonment.

II. The Seventh Circuit And The Other Circuits To Reach Similar Conclusions Have Misapplied This Court's ACCA Precedent.

The Seventh Circuit, and the circuits on which it relied, has decided an important federal question in a manner that is at odds with this Court's applicable precedent. Here, the Seventh Circuit properly applied the modified categorical approach and placed Mr. Dismuke in the second, nonviolent part of the Wisconsin vehicular fleeing statute. The Seventh Circuit, however, found that the nonviolent portion of that statute satisfied both parts of the *Begay* test.

In reaching that conclusion, the Seventh Circuit misapplied this Court's precedent in *Begay*, *Taylor*, *James*, and *Chambers*.

The second part of Wisconsin's fleeing statute does not satisfy *Begay's* test. For a crime to meet that test, it "must (1) present a serious potential risk of physical injury similar in degree to the enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives; and (2) involve the same or similar kind of 'purposeful, violent, and aggressive' conduct as the enumerated crimes." Pet. App. at 16a-17a. As to the first part of *Begay's* test, the portion of the Wisconsin statute at issue applies when individuals only increase their speed or turn off their vehicle's lights in an attempt to flee. Such conduct is far removed from the necessary degree of risk of physical injury required to be similar to the ACCA's enumerated crimes. In fact, the Wisconsin fleeing statute specifically limits conduct that falls within this part of *Begay's* test to the first portion of the statute, i.e., "willful and wanton" fleeing "as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians." Wis. Stat. § 346.04(3). As such, the Seventh Circuit erred when it found that Mr. Dismuke's fleeing conviction met the first part of *Begay's* test.[11]

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[11] Before the Seventh Circuit, Mr. Dismuke argued that the first part of the *Begay* test was not satisfied by the crime for which he was convicted—that is, the part of the fleeing statute he was convicted under did not require that he place anyone in danger (indeed that behavior is confined to the first part of the statute). Mr. Dismuke noted, however, that the Seventh

The Seventh Circuit also erred when it held that Mr. Dismuke's fleeing conviction satisfied *Begay's* second part. In doing so, the Seventh Circuit ignored the holdings of this Court in *Taylor* and *James*. In *Taylor*, this Court upheld the "categorical" approach, which requires sentencing courts to look "only to the statutory definitions of the prior offenses" to determine if they are violent felonies. 495 U.S. at 600. In *James*, this Court clarified that under the categorical approach a court should focus its "inquiry" on "the conduct encompassed by the elements of the offense, in the ordinary case." 550 U.S. at 208. In accord with *Taylor* and *James*, the Seventh Circuit should have limited its analysis to whether increasing a vehicle's speed or extinguishing its lights in attempt to flee was violent and aggressive conduct. The Seventh Circuit did no such thing, rather it stated that the second part of Wisconsin's statute "calls [for] the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit." Pet. App. at 26a

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Circuit had previously determined that the very same statute did present a serious potential risk of physical injury. (Pet'r's Appellate Br. at 31 (referencing *United States v. Howze*, 343 F.3d 919, 922 (7th Cir. 2003)). The Seventh Circuit characterized that recognition as an "apparent concession"—it was no concession, but rather a simple acknowledgment of the circuit's controlling precedent on the issue. *See* Pet. App. at 17a & n.3 (Seventh Circuit's discussion of the split between circuits on this issue). Mr. Dismuke reiterated his argument in his petition for rehearing *en banc*. (Pet'r's Pet. Rehr'g *En Banc* at 2 (citing *Peterson*, 2009 WL 3437834, at *2 (unpublished decision))).

(quoting *Spells*, 537 F.3d at 752). Based on that parade of horribles, which is the ordinary case for the first part of Wisconsin's fleeing statute, not the second, the Seventh Circuit found that Mr. Dismuke's conviction was violent and aggressive. *Id.* at 28a. That outcome is wrong.

In addition, the Seventh Circuit ignored this Court's *holding* in *Chambers* in deciding Mr. Dismuke's case. In *Chambers*, this Court overruled the precedent of many circuits, including the Seventh, that all escapes involve a serious risk of potential injury. *See* 129 S. Ct. at 691-92. That precedent was a key factor in prior circuit decisions that held that vehicular fleeing statutes were violent felonies. *See, e.g.*, *Spells*, 537 F.3d at 751 (noting that "every escape involves a serious potential risk of physical injury to another" (citation and marks omitted)). But rather than rely on *Chambers'* holding in analyzing subsequent fleeing statutes, the Seventh Circuit, like the circuits it relied on, have turned to *Chambers'* dicta to bolster their prior decisions. In that dicta, this Court stated that the "behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Chambers*, 129 S. Ct. at 691. The Seventh Circuit used that dicta to sidestep the case-by-case analysis of escape statutes that *Chambers* requires. Instead, it simply concluded that Mr. Dismuke's fleeing offense was more like an escape from custody, than a failure to report, and thus a violent felony. *See* Pet. App. at 26a-27a (citing the Fifth and Sixth Circuits' reliance on *Chambers'* dicta).

Certiorari should be granted to correct this misapplication of this Court's precedent on this important issue, which affects not only Mr. Dismuke, but all others similarly situated.

CONCLUSION

This Court should grant certiorari to resolve the deep and entrenched conflict that has arisen among the circuits regarding whether a fleeing statute, which criminalizes nonviolent conduct, is a violent felony under the ACCA.

Respectfully submitted,

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